

**OREGON DEPARTMENT OF TRANSPORTATION  
DBE TRAINING  
JULY 20, 21, 2011**

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# LEARNING OBJECTIVES

- DAY 1
  - History and Background
  - Reviewing an Application
    - Personal Disadvantage Group Membership
    - Economic Disadvantage
    - Ownership/Control/Independence/Expertise
    - Business structures and required documentation
  - Onsite Reviews
  - NAICS Codes and Business Size
  - Certification Denials and Appeals
  - Annual Affidavits and Statements of Change
  - Certification Revocations

# LEARNING OBJECTIVES

- Day 2
  - DBE Program and Contract Requirements
  - Contract Administration
  - Goals
    - Overall
    - Contract
    - Project
  - Good Faith Effort Reviews
  - Project Oversight and Monitoring
    - CUF and Counting

# HISTORY

- Title VI of the Civil Rights Act of 1964
- 1980 – DOT issued regulations to implement uniform MBE programs on Federally-assisted DOT projects. Included distinct goals for MBEs and WBEs



# HISTORY

- 1982 – Congress passed Surface Transportation Assistance Act
  - 10% National DBE goal
- 1987 – Congress passed the Surface Transportation and Uniform Relocation Assistance Act
  - Added women as presumed disadvantaged class
  - Added small business size standard

# HISTORY

1995 – *Adarand v. Peña*. U.S. Supreme Court case: Federal racial classifications must undergo strict scrutiny. Must show:

- Serve compelling government interest; and
- Is narrowly tailored to further that compelling government interest

# HISTORY

- 1999 – 49 CFR Part 26 created as DBE program regulations
  - “Good faith efforts” introduced
  - Maximize race-neutral concept
  - 10% goal became “aspirational”

# *Western States Paving v. Washington State DOT, et al*

- 2005 9<sup>th</sup> Circuit Court of Appeals case in which a majority-owned subcontractor sued the DOT, contending he was denied work on a Federal-aid highway contract because even though he submitted the lowest bid, the prime hired a DBE to meet the contract goal
- The court held that the Federal DBE Program served a compelling State interest and was constitutional on its face, but that to be “narrowly tailored,” States must limit race conscious measures (contract goals) to those groups that the State can show have actually suffered from discrimination
- As a result, Ninth Circuit States were required to conduct disparity studies to determine whether discrimination and its effects have occurred and what specific classes were affected

# NARROW TAILORING

DBE Programs must be “narrowly tailored,” meaning they must be structured only to remedy the effects of past and present discrimination, be flexible and end when the remedial purposes have been achieved

# WHAT IS A DBE?

**A Disadvantaged Business Enterprise (DBE) is a for-profit small business that is:**

- At least 51% owned by one or more individuals who are socially and economically disadvantaged
- Managed, operated and controlled by one or more of the socially and economically disadvantaged owners

# WHAT IS SOCIAL DISADVANTAGE?

- **Social –**

- Citizen or lawfully admitted permanent residents
- Groups with presumed social and economic disadvantage

<b>African Americans</b>	<b>Subcontinent Asian Americans</b>
<b>Hispanic Americans</b>	<b>Women</b>
<b>Native Americans</b>	<b>Others must prove individual social and economic disadvantage</b>
<b>Asian Pacific Americans</b>	

# CERTIFICATION

- Receive an application
  - New rule says certifying entity must request additional information within 30 days after receipt of the application
- 90 days from complete application
- Extend once for no more than 60 days with written notice and explanation with specific reasons for extension
- Failure to timely process is constructive denial appealable to DOT

# CERTIFICATION APPLICATION

- Statement from applicant of type of work it intends to perform
- Date Firm Established
- Date Disadvantaged Person Took Ownership
- Manner in which ownership obtained
- Legal form of ownership

# DBE CERTIFICATION STANDARDS

- Group Membership
- Social Disadvantage
- Economic Disadvantage
- Business Size
- Ownership
- Control

# SOCIAL DISADVANTAGE

- Social Disadvantage
  - Signed, notarized statement of membership in a presumptively disadvantaged group
  - If in question, certifying entity has burden of proof

# GROUP MEMBERSHIP

- Additional information may be required beyond notarized statement if well-founded reason-49 CFR 26.63
  - Written explanation of reasons for questioning group membership
  - Length of time individual held to be member of group
  - Whether person is regarded as a member by relevant community
  - Appropriate documentation of group membership

# INDIVIDUAL DISADVANTAGE

- Not in presumptively disadvantaged class, or group membership not proven, applicant required to prove individual social disadvantaged status
- Appendix E— Must include the following
  - One distinguishing feature
  - Personal experiences
  - Barriers to entry in business world
    - Education - Employment - Business History

# ECONOMIC DISADVANTAGE

- Personal Net Worth 49 CFR 26/67 (a) (2)
  - (i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.
  - (ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, **with appropriate supporting documentation.**

# PERSONAL NET WORTH

- Exclusions
  - Equity in primary residence
  - Ownership interest in applicant business

# PERSONAL NET WORTH

- Other adjustments:
  - Assets held in pension plans, IRAs, 401K accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant tax or interest consequences.
  - Include only the Present Value of such assets. Less the tax and interest penalties that would accrue if the asset were distributed at the present time.

# FOR MARRIED APPLICANTS

- Confirm whether or not PNW statement is reporting marital assets
- If an asset is held as community property, or jointly between two people, 50% of the value of the asset is normally attributed to each person

# COMMUNITY PROPERTY v. EQUITABLE DISTRIBUTION STATES

- **Equitable Distribution States**
  - The split is not necessarily 50-50. “Fair and equitable distribution.” Normally, property acquired prior to the marriage and acquired by gift or inheritance even during the marriage is excluded.
  - Oregon is Equitable Distribution State

# COMMUNITY PROPERTY v. EQUITABLE DISTRIBUTION STATES

- **Eleven Community Property States**
  - There is an absolute 50-50 split of all property acquired during marriage.
  - Washington, Idaho, California are Community Property States

# PERSONAL NET WORTH

- Should you simply accept an owner's PNW statement?
- Where the State DOT has a reasonable basis to believe PNW statement is incomplete or inaccurate, the recipient may "look behind" it, by seeking further information or conducting an investigation to resolve issues.

# PERSONAL NET WORTH

- **EXAMPLE:**

PNW Statement for  
Mona Lisa Jones

# ECONOMIC DISADVANTAGE

- Transferring personal assets to companies to avoid exceeding PNW calculation

# REVISED PNW

## Timeframe for applying new PNW cap

- Certification decisions made as of 2/28/11, regardless of when application received or whether decertification action pertaining to PNW in progress
- If denial of application based upon PNW is being appealed to UCP or DOCR and owner's PNW greater than \$750,000, but less than \$1.32M, resolve appeal using new standard
- If firm decertified or application denied within a year before 2/28/11 because PNW greater than \$750,000 but less than \$1.32M, firm recertified

# BUSINESS SIZE

- 49 CFR 26.65
- Must exist as a small business under SBA standards (13 CFR 121)
- Size standard applied must be for type of work firm seeks to perform in DOT-assisted contracts
- Dollars-not number of employees
- Receipts of affiliates must be included

# BUSINESS SIZE

Size standards by NAICS Code website:

[http://www.sba.gov/sites/default/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf)

# OWNERSHIP

- Consider all facts in record viewed as a whole

# OWNERSHIP

- Applicant must be owned by individuals
- Cannot be owned by another firm, even if DBE
- Except:
  - Disadvantaged individual owns and controls applicant firm through parent or holding company, e.g. for tax purposes
  - Parent company owns and controls subsidiary
  - Certify the subsidiary if cumulatively 51% ownership by disadvantaged individuals
  - Trusts, Tribes

# OWNERSHIP

- Not acceptable:
  - Promise to contribute capital
  - Unsecured note payable to firm or owner not disadvantaged
  - Participation as an employee
- Loans from financial institutions preferred
- Joint checking accounts
- Examine loans from family or friends

# OWNERSHIP

- Presumed not acceptable:
  - Gifts from any non-disadvantaged individual or non-DBE firm who is
    - Involved in the applicant firm
    - Involved in same or similar line of business
    - Engaged in an ongoing business relationship with the applicant firm.

# OWNERSHIP

- To overcome presumption applicant has burden of proof to demonstrate by clear and convincing evidence:
  - Gift was made for reasons other than DBE certification
  - Disadvantaged individual actually controls the applicant firm

# CONTROL

- Consider all facts in record viewed as a whole
- “You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm” – 49 CFR §26.71(n)

# NAICS CODES

- NAICS Code. Work performed by DBE must be described in terms of most specific NAICS Code that best describes type of work DBE owners can control and will perform on State DOT contracts
- May have multiple NAICS Codes
- State DOTs may also add a narrative description of work— clear and specific
- Ensure NAICS Codes are current and accurate
- Update Directory by August 28, 2011

# NAICS CODE

- Website
- <http://www.naics.com/search.htm>

# CONTROL

- Family-owned firm
  - Firm controlled by family as group not eligible
  - Non-disadvantaged family members may participate
  - Is disadvantaged owner really in charge?

# CONTROL

- Firm formerly owned by non-disadvantaged individual/family member
  - Transfers ownership to disadvantaged individual
  - Remains involved in the firm
- New owner has burden of proof by clear and convincing evidence
  - Transfer not made for DBE certification
  - Disadvantaged individual controls firm

# CONTROL

- Expertise
- Disadvantaged owner must have
  - Overall understanding of type of business
  - Managerial and technical competence
  - Relevant experience and education
  - Ability to intelligently and critically evaluate information from others in firm
  - Administrative functions insufficient

# CERTIFICATION

- Keep files confidential notwithstanding State law
- Safeguard from disclosure to unauthorized persons information that may reasonably be regarded as proprietary or confidential

# BUSINESS STRUCTURES

- Sole Proprietorships
- Partnerships
- Corporations (C, S, Close)
- Limited Liability Corporations
- Limited Partnerships
- LLPs/Professional Corps.
- Trusts

# SOLE PROPRIETORSHIP

- Sole Proprietorship
  - Firm and owner are one
  - Owner owns and operates
  - Don't have to file formation documents
  - Report business profits as income on personal tax returns

# SOLE PROPRIETOR

- Examine
  - License if necessary by law
  - Expertise/resume/previous employment
  - Current outside employment
  - Personal tax returns for business size
  - Equipment—titles, leases
  - Loans/financing

# PARTNERSHIPS

- Owned by two or more individuals who own an interest.
- Usually file business certificate. Partnership agreement is optional.
- Owners pay taxes on share of business income on personal tax returns.
- Terminates upon death or resignation of one partner
- Profits found on personal tax returns

# PARTNERSHIPS

- Must own 51% of each class of partnership interest
- Must be reflected in partnership agreement

# PARTNERSHIPS

- Examine:

## Partnership Agreement

- Can significant decisions be made when disadvantaged owner is not present?
- Do decisions require concurrence by non-disadvantaged individual?
- Who has signature authority?
- Personal tax returns for business size



# C CORPORATIONS

- Articles of Incorporation and bylaws filed with State
- Stockholders are owners--elect the Directors.
- May have different classes of stock
- Directors manage overall strategy of the business, appoint officers.
- Officers are under the direction of the directors and manage day-to-day business operations.
- Corporations are required to have annual meetings with record keeping (minutes).

# C CORPORATION

- “ Double taxation”

Business is taxed on its profits and individual shareholders are taxed on distributions, any money taken out of the corporation in the form of salaries and bonuses as personal income.

# C CORPORATIONS

- Must own at least 51% of each class of voting stock and 51% of aggregate of all stock outstanding
- Held directly by disadvantaged persons
- Must hold highest officer position
- Must control Board of Directors

# C CORPORATIONS

- **Examine**
  - Identify officers and board members, include gender/ethnicity, date appointed, whether they are involved in or have ownership in other business
  - Trace firm's ownership back
  - Corporate tax returns to confirm business size requirements

# C CORPORATIONS

- **Examine Bylaws; Meeting Minutes**
  - Who's on the board? What constitutes a quorum?
  - Can significant decisions be made when disadvantaged owner is not present?
  - Do decisions require concurrence by non-disadvantaged individual?
  - Who has signature authority?
  - Who's running the meetings?

# C CORPORATION

- Articles of Incorporation

Name of Business; Name of Members; Address of Business; Purpose of Business; Registered Agent. These requirements vary by State.

# S CORPORATIONS

- Term for owner is shareholder.
- Single class of stock
- Limitations on number of owners.
- Files Certificate of Incorporation and Bylaws
- Fewer formalities--annual meetings with record keeping (minutes).

# S CORPORATIONS

- “Pass through” corporation  
Earnings are distributed to owners who may report corporate profits on personal tax returns.
- Avoid “Double Taxation”
- Often one person owns all stock and acts as only employee

# S CORPORATIONS

- Examine
  - BYLAWS
  - Certificate of formation Sometimes called Articles of Incorporation/Charter of Incorporation/Articles of Association
  - Annual Report
  - Personal tax returns to determine gross receipts

# CLOSE CORPORATIONS

- Shares not freely traded
- Held by limited number of people (laws vary by State)
- Shareholder's are actively involved in managing and operating the corporate business
- May have one director and one person fill all officer spots
- May elect to be taxed as C or S Corp

# Close Corporation

- Examine as a corporation
- Most States do not require annual meetings or shareholder reports
- Document determining operating procedures: Corporate Bylaws and/or Shareholder Agreement

# LLCs

- Owned by members who control the business.
- Members elect managers (or managing members) to manage the day-to-day operations of the businesses.
- Officers, if any, perform under the direction of the managers.
- LLC must file Articles of Incorporation or Certificate of Formation, but filing an Operational Agreement is not required.
- Owners taxed directly on corporate profits
- No formal meetings or recordkeeping required, but must file annual report.

# LLCS

- Must own at least 51% of each class of member interest
- Document that determines operating procedures: Operating Agreement

- **Examine:**
  - Articles of Incorporation and Operating Agreement
  - Who are the Members/Managers/Officers?
  - How are firm decisions made?
  - Can significant decisions be made when disadvantaged owner is not present?
  - Do decisions require concurrence by non-disadvantaged individual?
  - Who has signature authority?

# LPs

- Must file "Certificate of Limited Partnership" with the State
- Operate under a partnership agreement (required), name must include "LP"
- Created by one or more persons, the General Partner, who solicits investments from others--lps
- Limited Partners passive

# LPs

- Disadvantaged Owner must be General Partner
- Document that determines operating procedures: Limited Partner Agreement
- Sometimes Called General/Limited Partner Agreement



# LLPs

- Require 2 or more partners.
- LLPs can only be used for certain types of professional practices (as dictated by state law)
- Since LLPs have no “General Partners,” LLPs can limit partner liability for everything but personal acts.
- Some states require public notice before establishing.

# LLPs

- Disadvantaged Owners must own 51% of Partnership Interest
- Document that determines operating procedures: Limited Liability Partnership Agreement

# PCs

- Organized to provide professional services
- PCs sometimes required by State law for doctors lawyers, engineers, occupations that require a license
- Can choose if taxed as C or S corporation
- Some states do not allow stock to be issued other than to licensed professionals in the PC
- Examine as corporation

# TRUSTS

- Operate under Declaration of Trust
- Terminates upon the earlier of death of beneficiary or termination date of trust. Governed by Trustee as set forth in Declaration of Trust
- Can't be owner of DBE, unless....



# TRUSTS

- If Applicant is owned by Trust examine Declaration of Trust:
  - Beneficial owner and trustee must be disadvantaged persons; or
  - Beneficial owner must be disadvantaged AND exercise control of firm rather than trustee; or
  - Same disadvantaged person is grantor, beneficiary and trustee of revocable living trust.

# ONSITE REVIEWS

# LEARNING OBJECTIVES

- What/When/Why Onsite Reviews Are Required
- Objectives for On-site Review
- What to look for/ask for
- Conducting Interviews

# WHEN?

- Original Application--26.83(1)
- Annual Update indicates material change
- DBE notification of material change
- Additional NAICS Code requested
- 3<sup>rd</sup> Party Complaint, etc.
- As a matter of procedure at certain intervals of time

# WHY?

- Onsite reviews are most effective means of confirming representations that:
  - The Disadvantaged Owner controls firm for each NAICS Code requested
  - The firm operates independently
  - Owns what it what it says it owns

# WHY?

- If regular dealer, determine it has warehouse and/or distribution equipment
- If manufacturer, determine if it has plant
- Has staff and equipment necessary to do the job

# DETERMINE CONTROL

- Has expertise/ability to intelligently and critically evaluate information presented by others
- Makes independent decisions
- No restrictions

# DETERMINE CONTROL

State DOT (or UCP) must only certify **independent firms** as DBEs – 49 CFR § 26.71(b)

- Are all, or most of its contracts, with one prime?
- Has the DOT discovered **via onsite review** that the firm co-located with another firm?
- Present or recent employer/employee relationships between the DBE owner and non-DBE?

# DETERMINE CONTROL

- Independence
  - Is firm dependent on another for viability?
  - Are all, or most of its contracts, with one prime?
- Has the DOT discovered **via onsite review** that the firm co-located with another firm?
  - Present or recent employer/employee relationships between the DBE owner and non-DBE?

# COME PREPARED

- Know before you go:
  - Business Structure
  - Owner or Owners
  - Percentage Ownership
  - PNW
  - Gross Receipts
  - Become Familiar with Business Documents

# ONSITE REVIEWS

- Onsite to principal offices required
  - Look for:
    - Co-location with other firm
    - Is the applicant firm identified on outside?
    - Shared personnel/equipment
    - Observe disadvantaged owner's office, does it look like an office of someone in charge?

# ONSITE REVEIWS

- Interview Disadvantaged Owner Alone
  - Find out what an owner of this type of business should know and ask the tough questions—ask an expert to go with you
- Interview Principal Officers
- Let them talk...
- Review recent contracts—who signed

# ONSITE REVIEWS

- On-site Visit to Job Site if Active
  - Is the applicant's equipment in use?
  - Do the worker's know who they work for?

# GET IT RIGHT AT CERTIFICATION

A good job on the front end, i.e., careful certification procedures and proper identification in the DBE Directory, prevents many oversight problems in the field

# GET IT RIGHT AT CERTIFICATION

- State DOT (or UCP) should only identify a DBE as a “Regular Dealer” if it has **confirmed via onsite review** that:
  - DBE owns and operates a store or warehouse that contains products it sells to public - 49 CFR §26.55(e)(2)(ii)(A)
  - DBE owns and operates distributing equipment for bulk items - 49 CFR § 26.55 (e)(2)(ii)(B)

# GET IT RIGHT AT CERTIFICATION

DOT should only identify a DBE as a “Manufacturer” if it has **confirmed via onsite review** that:

- Firm operates a factory that produces materials on the premises to meet contract specifications
- Or, takes product and alters it to meet contract specs

49 CFR §26.55(e)(1)(ii)

# GET IT RIGHT AT CERTIFICATION

DOT should only identify a DBE as a “Hauler” if it has **confirmed via onsite review** that:

- It owns and operates at least one fully licensed, insured, and operational truck

49 CFR §26.55(d)(2)

# GET IT RIGHT AT CERTIFICATION

If a DBE is identified as a “Broker” only State DOT (or UCP) should note this in Directory and/or certification letter

- Example: **Certification letter:**

Based on the application and supplemental information you provided, your application for certification as a Disadvantaged Business Enterprise (DBE) in the State of \_\_\_\_\_ has been approved. Your company has been approved as a **DBE** to conduct business as a **broker of \_\_\_\_\_** under NAICS Code \_\_\_\_\_. **(Note: Pursuant to 49 CFR §26.55, as a broker, only the reasonable amount of fees and commissions charged or services provided are eligible for DBE credit.)** If the circumstances on which this certification was made change, you are directed to notify the \_\_\_\_\_(certifying authority) ...

# ONSITE REVIEW

- Develop Questionnaire
- Type out answers
- Print out onsite
- Signature

# ONSITE REVIEW

- Develop Questionnaire
- Type out answers
- Print out onsite
- Signature

# INTERSTATE CERTIFICATION

49 CFR §26.83 has been expanded  
**Implemented beginning January 1, 2012**

# INTERSTATE CERTIFICATION

## Time Frames

- Applicant sends Home State A certification letter to State B, requests certification
- State B confirms with State A or on-line

**State B may accept State A's certification without further action**

# INTERSTATE CERTIFICATION

## **If State B does not choose to accept**

- Applicant sends all documents to State B
  - Copy of State A application and all other supporting documents, affidavits of no change, correspondence
  - Copy of notices from other States about application status, denials, decertifications
  - Copy of any certification appeals with DOT
  - Affidavit that all information is true and correct
- State B has 7 days to request onsite from State A
- State A has 7 days to provide onsite to State B

# INTERSTATE CERTIFICATION

- State B has 60 days from receipt of all applicant materials to certify firm
- If, within 60 days of receipt of all applicant information State B finds good cause to object to State A certification must send notice to applicant of specific reasons for determination and offer applicant opportunity to respond via writing or in person.
- State B must have meeting within 30 days of applicant's request

# INTERSTATE CERTIFICATION

- Applicant firm has Burden of Proof—
- Applicant need only address issues raised by State B
- State B must issue written decision within 30 days of applicant's written response or meeting with decision maker (later of the two)
- Applicant may appeal to DOOCR

# INTERSTATE CERTIFICATION

- Good Cause to Reject
  - Evidence of fraud
  - New information
  - Certification factually erroneous or inconsistent with regulations
  - Laws of State B require different result
  - Applicant does not submit required documentation

# OTHER CERTIFICATION

- §§ 26.84 and 26.84 deleted DOT/SBE MOU lapsed; SBA allows self-certification
- DOCR database of DBE decertifications and denials

# OTHER CERTIFICATION

- A DBE stays certified until its certification is removed through due process procedures in 49 CFR §26.87
- No such thing as “recertification” or “expiration”

# CERTIFICATION DENIALS

- Must provide written explanation with reasons for denial
  - Specific evidence in record leading to denial
  - Specific portion of the regulations upon which denial is based
  - Include ALL reasons for denial
  - Include information of appeal rights under 26.89, including address and 90 day time frame

# CERTIFICATION APPEALS

- UCP must provide entire record to USDOT within 20 days of request
- USDOT decision based upon status of firm as of date of appeal
- USDOT affirms UCP decision unless it is not supported by evidence in the record
- USDOT may remand for additional investigation if record incomplete or unclear
- If USDOT reverses denial, UCP must take immediate action to certify firm
- USDOT will not uphold denial based on grounds not specified in UCP decision

# CERTIFICATION DENIAL

- Establish time period of no more than one year (from time firm receives letter of denial) before firm may reapply for certification
- Less than one year with FHWA Division approval
- Normal re-application waiting period does not apply to firms that withdraw-but can go to “end of line” when issue corrected (New rule)
- Unless abuse of withdrawal is determined

# CHANGED CIRCUMSTANCES

- DBE must inform UCP in writing of any change affecting size, disadvantaged status, ownership or control
- Changes in management
- Attach supporting documentation
- Notification in form of affidavit
- Within 30 days of the change

# ANNUAL AFFIDAVIT

- DBE must provide every year sworn affidavit affirming no changes in circumstances affecting size, disadvantaged status, ownership or control or any material changes in the information provided in the application form.
- Must specifically affirm that firm continues to meet business size standards
- Supporting documentation attached—Tax Returns personal and corporate

# REMOVING DBE CERTIFICATION

## ● 26.87 Procedures

- Written notification that there is “reasonable cause to believe that a certified firm is ineligible”
- Specific reasons, evidence, regulations
- Opportunity for informal hearing to respond and provide supporting evidence—firm could choose to submit writing
- UCP has burden of proof
- Decision-maker not involved in original decision
- Maintain complete record of hearing

# REMOVING DBE CERTIFICATION

- Grounds for decision
  - Change in firm since certification
  - Information not available at time of cert
  - Information concealed or misrepresented
  - Change in federal regulations
  - Documented finding that original decision was factually erroneous
  - NOT changed opinion

# REMOVING DBE CERTIFICATION

- Firm remains certified until internal decision is rendered
- Written notice of decision
  - Specific record evidence, regulations
  - Appeal information

# REMOVING DBE CERTIFICATION

## ● Effects of Certification Removal

- Prime or State DOT made commitment to use DBE AND subcontractor executed before DBE is notified of its ineligibility, prime may count work toward goal BUT State DOT cannot count toward annual goal—except if because exceeded size standard
- Prime or State DOT made commitment but subcontractor not executed before DBE is notified, prime cannot count work toward goal, must make good faith efforts to replace with eligible DBE

# THIRD-PARTY COMPLAINTS

- Written complaint may be filed by any person alleging DBE ineligible
- Not required to accept general allegations or anonymous complaint
- Complainant's identity must be kept confidential
- Must review records; may request additional information and investigate

# USDOT INITIATED PROCEEDINGS

- FHWA finds reasonable cause to believe certified firm is ineligible
  - Direct UCP to initiate removal proceedings
  - FHWA must provide UCP and DBE with notice, including reasons
  - UCP must immediately start removal proceedings



# DBE DIRECTORY

- Must maintain a directory of all certified DBEs
  - Address/phone number (email)
  - NAICS Code that best describes types of work the firm has been certified to perform
  - Be specific—add narrative description
  - Keep up-to-date
  - DBEs should not all have same NAICS Code
  - Ensure NAICS Codes are current and accurate
  - Update Directory by August 28, 2011

# DBE COMPLIANCE

**WHAT'S REQUIRED?**

# DBE v STATE and LOCAL PROGRAMS

- All contracts that include Federal funds must incorporate the DBE program and may not impose State or local MBE/WBE subcontracting goals
- Federally-funded contracts may not include local hiring goals or preferences  
23 CFR § 635.117(b)

# DBE PROGRAM

**Program Plan** - must have a FHWA approved, up-to date DBE Program Plan which describes exactly how your program is run

**Policy Statement** – commitment to DBE program and responsibilities for implementation

**Liaison Officer**- Independent and direct access to CEO

# DBE PROGRAM PLAN

49 CFR §26.39 has been added

- State DOT must include a small business element to its DBE program to facilitate participation by small businesses generally, not just DBEs
- Submitted to FHWA by Feb. 28, 2012

# RECORDS & REPORTS

- Must keep records of all DBE participation on contracts
- Bidders List
  - All firms bidding or participating (primes & subs)
  - Include: name, the age of firm, and annual gross receipts
  - To be used to set overall goals
- Must submit bi-annual uniform reports

# ASSURANCES

- **Assurances** - language clarifies recipient/contractor requirements
  - Must submit to FHWA
  - Must include in all contracts
  - Must require prime contractors, subcontractors, and subrecipients (cities, counties, MPOs, LPAs, etc.) to include in all contracts

# DBE GOALS

- Overall Goal--the program requires each State to establish an overall DBE goal
- The overall goal represents the gap, or disparity, between the current percentage of DBE participation on transportation projects and the percentage of DBE participation that would be expected based upon availability of DBEs in the relevant market area

# RACE-CONSCIOUS/RACE-NEUTRAL



Most States have overall goals that include a combination of race-conscious and race-neutral goals

# DBE GOALS

**HOW TO SET AN OVERALL  
DBE GOAL  
CONTRACT GOALS  
AND GOOD FAITH EFFORTS**

# BASE FIGURE – STEP 1

- Goal must be based on demonstrable evidence of availability of ready, willing, and able DBEs
- Four examples from regulations:
  - DBE Directory + Census
  - Bidders List
  - Disparity Study
  - Or Alternate Method

# BASE FIGURE (CONT.)

- The base figure will be a percentage corresponding to:

Number of Ready,  
Willing & Able DBEs

= % Base Figure

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Number of All Firms  
Ready, Willing & Able

# BASE FIGURE (CONT)

- Best data available
- How was data collected
- What were data sources and why are they reliable
- What is the market area—explain with dollars and locations of firms—create table
- Weighting by work type

# ADJUSTMENTS – STEP 2

- DOT must examine all available evidence and determine what adjustments, if any, are necessary
- Goal of adjustment: fine-tune goal to reflect percentage of work DBEs likely to obtain absent discrimination

# ADJUSTMENTS (CONT.)

- Types of potential data:
  - Median past DBE participation—be careful may reflect discrimination— at least 5 years
  - Disparity studies
  - Lack of access to financing
  - Statistical employment data
  - Other data showing likely DBE participation—drastic changes in the economy

# RACE-NEUTRAL PROJECTION

## STEP 3

- DOT must meet maximum portion of overall goal by facilitating race-neutral participation
- DOT must project how much of the overall goal it expects to meet through race-neutral participation—explain reasons for conclusion

# OVERALL GOAL EXAMPLE

- INDOT 2009
- Used Bidders List (Divided DBE by all firms)
- INDOT Base Figure was 8.32 (headcount)
- INDOT Adjustments:
  - Median Past Participation (MPP)
    - 10.52% achieved on “closed-out” contracts between 2002-2007, actual payments

# OVERALL GOAL EXAMPLE

2. Based on this data, INDOT averaged MPP with the Base Figure:

**Base (8.32%) + MPP  
(10.52%)**

---

**2**

**Adjusted Base  
Figure  
9.42%**

# OVERALL GOAL EXAMPLE

## Maximize Race-Neutral

Race-Neutral means assisting all Small Businesses. Possible RN Considerations:

- DBE Outreach and Training
- Past Goals Exceeded
- DBEs as Prime Contractors
- Non-Goal Participation

2.7%

# OVERALL GOAL EXAMPLE

- In this example:
- FFY 2009 DBE Goal: **9.42%**
  - **6.72 Race Conscious**
  - **2.70 Race Neutral**

# DBE CONTRACT GOALS

- State DOTs with race-conscious goals achieve their goals by imposing DBE goals to Federal-aid contracts
- States are not required to set DBE goals on every Federal-aid contract, but must set goals on enough individual contracts to cumulatively reach the overall goal
- States set appropriate, “narrowly tailored,” DBE goals on individual contracts based upon consideration of their overall goal, subcontracting opportunities available for each project, and availability of DBEs to perform the work in the geographic area

# DBE OVERALL GOAL

- DOT must keep running tally of DBE commitments
- Make any race-conscious/race-neutral adjustments necessary throughout year

# ACCOUNTABILITY

49 CFR §26.47 has added (c)

- State DOT that has not meet its overall DBE goal in any given year must submit written analysis to FHWA of why the goal was not met and corrective actions to be taken

# ACCOUNTABILITY

## Timeframe

- State DOT must submit detailed analysis and established corrective measures to FHWA Division within 90 days of end of fiscal year FOR APPROVAL
- If FHWA approves, State DOT in compliance
- FHWA may give conditional approval
  - Modifications to overall goal methodology
  - Changes to RC/RN projections
  - Additional RC or RN measures

# ACCOUNTABILITY

State DOT is in non-compliance if ANY of the following occur:

- Do not submit analysis and corrective actions to FHWA timely
- FHWA disapproves of analysis or corrective actions
- Do not fully implement corrective actions or FHWA imposed conditions for acceptance

# ACCOUNTABILITY

- FHWA can intervene before end of fiscal year if Uniform Report shows unlikelihood of meeting annual goal

## **RELATED:**

- 26.51(f) added language. Even if State DOT projects it can meet its overall goal through race-neutral means alone, can establish contract goals if necessary to meet overall goal.

# PROJECT GOALS

- State DOTs may set overall project goals that are separate and distinct from the annual overall goal. 49 CFR §26.45(e)(3)
- This new rule codifies Departmental guidance issued in 2002.
- Follows the same process as annual overall goal setting.

# CONSULTANT CONTRACTS

- If a contracting agency establishes a DBE participation goal on a consultant services contract that has sub-consulting opportunities, the agency cannot disqualify a consultant for failing to meet the contract goal provided the consultant made good faith efforts to meet the participation goal (as specified in 49 CFR 26.53 and Appendix A).

# CONSULTANT CONTRACTS

- May include DBE goal in the advertisement or solicitation
- The top-ranked firm required to demonstrate how the firm would meet the goal at the negotiation phase of the procurement process.

# CONSULTANT CONTRACTS

- If, during the negotiation phase of the procurement process, work committed to DBEs is decreased or eliminated through negotiation of the detailed scope of services the prime consultant must use good faith efforts in revision of its proposal to provide for the participation of DBEs

# CONSULTANT CONTRACTS

- To harmonize Federal statutory policy, a State may establish the use/participation of certified DBE sub-consultant firms as an evaluation criterion which shall be no more than ten (10) percent of the total evaluation criteria in assessing the qualifications of firms to perform the solicited services.

# DBE CONTRACT GOALS

If a prime contractor/consultant does not meet the DBE contract goal, it must provide the State DOT with documentation to show that it used “good faith efforts” to do so

# DBE GOOD FAITH EFFORTS

**“Good Faith Efforts” defined:**

***“...those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal.”***

**-49 CFR Part 26, Appendix A**

# EXAMPLES OF GFE

- Solicit certified DBEs as early as possible
- Select portions of the work to be performed by DBEs; economically feasible units
- Providing adequate information
- Negotiating in good faith
- May not reject on price alone if reasonable
- May not reject because prime chooses to self-perform
- Not reject DBE as unqualified without reason

# DOT EVALUATION OF GFE

- Rigorous review of documented efforts
- Review performance of other bidders
- Lowest price not sufficient reason to reject
- Review all subcontractor quotes
- Follow up with DBEs to see if contacted
- Beware of meaningless, pro-forma contact/solicitation

# GOOD FAITH EFFORTS

DOT required to provide  
“reconsideration mechanism” for  
GFE determinations by objective  
third party

# DBE COMPLIANCE

## OVERSIGHT AND ENFORCEMENT

# CONTRACT ADMINISTRATION

- **Put it in the contract!**
  - Contract provisions
  - Include FHWA 1273
- Legally binding agreement
- What happens in the event of breach?

# CONTRACT TERMS

Contract must contain these provisions

- Non-discrimination
- Prompt payment
- Retainage
- Enforcement Provisions
  - Liquidated Damages
  - Best defense is a good offense!

# PROMPT PAYMENT

- Must have contract provision that requires primes to pay **all** subcontractors, material suppliers, truckers no later than 30 days after completion and acceptance
- “Satisfactory Completion” means portion of the work has been completed and accepted.
- Are subs being paid promptly?

# RETAINAGE

DOT must select one of the following options for retainage:

- Decline to hold retainage and prohibit prime from holding retainage
- Decline to hold retainage from prime, but allow prime to hold from sub
- Hold retainage from prime and provide for incremental acceptance
- Is it being followed?

# SANCTIONS

- What does the contract say?
- Withhold estimates, progress payments
- Breach of contract
- Liquidated damages
- Internal prequalification process remedies
- OIG investigation if fraud suspected



# PROJECT MONITORING

Project monitoring not just responsibility of Civil Rights Staff

- State field/central office
- FHWA
- Process needs to clearly define roles and responsibilities at all levels



# APPROVING DBE COMMITMENTS

- Is DBE is certified to perform type of work listed?
- Is the dollar amount of the subcontract commensurate with the type of work to be performed?

# TERMINATION FOR CONVENIENCE

49 CFR §26.53 (f) has been expanded

- Prime contractors may not terminate for convenience a DBE that it relied upon to obtain the contract without:
  - Good Cause
  - State DOT written approval

# TERMINATION FOR CONVENIENCE

## What Constitutes Good Cause?

- DBE fails or refuses to sign contract
- DBE fails or refuses to perform to normal industry standards
- DBE fails to meet prime's reasonable bond requirements
- DBE goes bankrupt
- DBE is suspended or debarred (ineligible for fed. contracts)
- DBE is not a responsible contractor (in opinion of recipient)
- DBE voluntarily withdraws
- DBE is ineligible to receive DBE credit for work type
- DBE death or disability
- Other documented good cause

# TERMINATION FOR CONVENIENCE

## What Does Not Constitute Good Cause?

- Prime wants to self-perform the work
- Prime want to substitute with another DBE or non-DBE subcontractor
- Prime contractor makes it impossible for DBE to perform its work in an acceptable manner

# TERMINATION FOR CONVENIENCE

## Request to Terminate for Good Cause

- Prime gives written notice to DBE of intent to terminate with copy to State DOT
- DBE has 5 days to respond to notice and explain why it objects and why State DOT should not approve prime's request (shorter period if public safety involved)
- Applies to post-awards and pre-award deletions and substitutions

# PROGRAM OVERSIGHT

49 CFR §26.37 has been expanded

- State DOTs must provide written certification that it has reviewed records AND monitored work sites in-state to ensure work committed to DBEs is actually performed by DBEs to which the work was committed
- **Every** contract

# DBE PROGRAM COMPLIANCE

## DEFINITION, COUNTING AND CUF

# DEFINITIONS AND COUNTING

- Subcontractor
- Manufacturer
- Regular Dealer
- Service Provider (Consultant or Broker)
- Hauler

# DEFINITIONS AND COUNTING

## **DBE Subcontractor**

- Most common
- Performing specific work items with own forces pursuant to a contract agreement with prime
- Furnish and install
- Count 100% of prime's payment to DBE toward contract goal

# DEFINITIONS AND COUNTING

## **DBE Subcontractor (cont.)**

Count cost of materials if

- the DBE negotiates the price, arranges delivery, take ownership, and pays for the materials and supplies for the project
- the DBE prepares the estimate, quantity of material, and is responsible for the quality of materials
- May not count cost of material, supplies, equipment purchased/leased from prime

# DEFINITIONS AND COUNTING

## **DBE Manufacturer**

- Prime purchases materials from a DBE manufacturer
- DBE operates a factory that produces materials on the premises to meet contract specifications
- Or, DBE takes product and alters it to meet contract specs
- Count 100%

# DEFINITIONS AND COUNTING

## **DBE Regular Dealer**

- Prime contracts with a regular dealer to supply and deliver products.
- Regular dealer owns, operates a store or warehouse that contains products it sells to public
- For bulk items DBE must own operate distribution equipment
- Count 60% of cost of materials/supplies

# DEFINITIONS AND COUNTING

DBE material supplier that are not regular dealers

- Count fees charged for assistance in procurement of materials and supplies, include transportation and delivery charges, if applicable
- Make sure charges are not inflated

# DBE HAULERS

- Own and operate at least one truck
- Manage trucking operation for portion of contract for which it is responsible
- Long-term leases to supplement must be agreement for exclusive use and control
- Must provide valid lease agreement at job site

# COUNTING TRUCKING

- Count value of trucking services provided by DBE with trucks it owns
- If DBE supplements its fleet:
  - Count value of trucking services provided by other DBE firms with their own trucks
  - Count value of trucking services provided by non-DBE firms in an amount not to exceed value of trucking services provided by DBE firms. 1:1

# DEFINITIONS AND COUNTING

## **DBE Service Provider**

**Prime hires a DBE to provide a bona fide service**

- Professional
- Technical
- Managerial
- Brokerage

**Count** entire amount of fees or commissions if reasonable

# DBE OVERSIGHT

- No matter what DBE is certified or hired to perform, count only the value of the actual work or service it is providing toward goal
- Is prime paying DBE for supplying materials and counting 60% toward goal when DBE is brokering and prime is entitled to count only commissions and fees?

# LPA, MPOS, SUBRECIPIENTS

- DOT has obligation to monitor its subrecipients
- DOT let subrecipient contracts
- DOT have mandatory reporting systems
- Must do subrecipient DBE reviews

# COMMERCIALLY USEFUL FUNCTION

## **For CUF Reviews Consider:**

- Is the DBE operating independently?
  - Using its own employees
  - Using its own equipment
  - In charge
- Is the DBE performing what the contract said it would perform?

# STANDARD INDUSTRY PRACTICE

- Would the DBE be performing in the same manner if it were not a DBE?
- But--even if standard industry practice may not be inconsistent with DBE program



# INDEPENDENCE RED FLAGS

- Supervision of DBE employees by prime or other contractor
- DBE's owner unaware of the status of the work or the performance of the business
- Inquiries are answered by prime, not DBE

# EQUIPMENT RED FLAGS

- Equipment used by DBE belongs to the prime contractor or another contractor with no formal lease agreement
- Equipment signs and markings cover another owner's identity, usually through the use of magnetic signs

# EQUIPMENT

- DBE may lease equipment if consistent with standard industry practice and at competitive rates
- A lease agreement is required and should be on long-term basis
- A DBE may lease equipment on an *ad hoc* basis from another contractor, excluding the prime, with approval from the DOT
- Equipment leased and used by the DBE with payment deducted from the prime contractor's payment(s) to the DBE is not allowed



# MATERIALS RED FLAGS

- Materials for the DBE ordered, or paid for, by the prime
- Joint checks used to pay for the materials
- Materials or supplies necessary for the DBE's performance are delivered by or billed to another business

# PERFORMANCE RED FLAGS

- Are DBEs being “helped” in their performance? Work performed jointly with another firm
- Any portion of the work performed by the prime or any other firm?
- The DBE is working without a subcontract agreement

# TRUCKING RED FLAGS

- DBE truck never at jobsite
- Prime is using its trucks for portion of work committed to DBE
- Unfamiliar trucks at jobsite
- Drivers can't identify employers

# TRUCKING

Must develop trucking guidelines and include in contract

- DBE must report payments to supplemental haulers, indicating whether or not DBE
- Random audits to verify
- Collect tickets
- Verify trucking firm before allowed on jobsite
- Require list of all trucks to be used on job

# TRUCKING

- Best practice ask for trucking plan/schedule at certain time—before contract award or before notice to proceed
- Do not accept DBE trucking commitments that clearly can't be met. Consider a lack of GFE, or require prime use GFE to obtain additional DBEs

# CHANGE ORDERS

- Change Order:
  - With more than a minimum impact on the contract amount
  - On a contract with a DBE goal
  - Regardless of which party initiates
  - Prime contractor must make good faith efforts to obtain additional DBE participation necessary to meet contract goal

# DBE COMPLIANCE

- Is this allowed?
- Can it be counted?

# DBE COMPLIANCE

Prime hires DBE as a subcontractor to furnish and install lists toward DBE commitment

Oversight reveals DBE is working as a broker

- Is this allowed?
- Can this be counted?

# COMMON PROBLEMS

DBE is using prime's equipment

- Is this allowed?
- Can it be counted?

# DBE COMPLIANCE

DBE purchases materials or supplies from the prime.

- Is this allowed?
- Can it be counted?

# DBE COMPLIANCE

DBE leases equipment that includes two persons that are not employees of the DBE.

- Is this allowed?
- Can it be counted?

# CONTRACT COMPLIANCE

Prime listed DBE hauler X to perform hauling services for a contract item.

Oversight reveals that no one has ever seen a truck owned by DBE hauler X on job site. Prime says DBE's truck broke down, and DBE is supplementing with other DBE and non-DBE trucks.

- Is this allowed?
- Can it be counted?

# CONTRACT COMPLIANCE

Prime lists DBE X toward goal to perform rebar services. Due to weather delays, prime is behind schedule (bonus for early completion). Oversight reveals Prime's employees help DBE tie rebar to save time.

- Is this allowed?
- Can it be counted?

# Watch Closely

- Joint Ventures
- Mentor Protégés
  - Prior approval of plan
  - Distinct roles

# COMPLIANCE AND ENFORCEMENT

## Compliance & Enforcement

- **Failure to comply by DOT**
  - Suspension/termination of Federal funds
  - Refusal to approve projects, grants, contracts
- No sanctions where compliance precluded by Federal court order finding requirement unconstitutional (9<sup>th</sup> Circuit)

# COMPLIANCE AND ENFORCEMENT

- **Enforcement actions**
  - **General Complaints made against DOT**
    - **Any person**
    - **Within 180 days**
    - **In writing**
    - **Confidentiality**
  - **Compliance Reviews by FHWA**
  - **Finding of Noncompliance**
    - **Reasonable cause notice**
    - **Conciliation**
    - **Enforcement Actions**

# COMPLIANCE AND ENFORCEMENT

## **Enforcement Actions - Contractors**

- Suspension/debarment
  - False representation as DBE
  - Attempt to use ineligible firm
  - Over-reporting

OIG

Referral to Dept. of Justice

# APPENDICES

- Appendix A-Good Faith Efforts
- Appendix B-Forms
- Appendix C-Business Development Program
- Appendix D-Mentor-Protégé Program
- Appendix E-Individual Determination of Social & Economic Disadvantage

# SUMMARY

- DOT recipients must collect data, submit reports, and monitor the performance of subrecipient.
- DBEs must perform a CUF to count DBE participation toward the recipients overall goal and the prime contractor's goal
- Recipients must provide effective program oversight
- Recipients must implement their DBE program as approved by FHWA to ensure that it is administered in a consistent and uniform manner that achieves the program objectives



THE END - THANK YOU